



**MASSACHUSETTS
IOLTA
COMMITTEE**

Eleven Beacon Street
Suite 820
Boston, MA 02108-3009

617 • 723 • 9093
617 • 367 • 8815 (Fax)
www.maiolta.org

Lisa C. Wood
Chair
Boston

Miriam H. Babin
New Bedford

John W. Delaney
Boston

Laurence M. Johnson
Boston

Antoinette E. M. Leoney
Boston

Marjorie H. O'Reilly
Newton

Martha Rush O'Mara
Melrose

Richard A. Soden
Boston

Kenneth J. Vacovec
Newton

Jayne Tyrrell
Director

May 7, 2008

Honorable John M. Greaney
Chair
SJC Rules Committee
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

RE: Residual Funds in Class Actions

Dear Justice Greaney:

I write on behalf of the Massachusetts IOLTA Committee to request an amendment to Mass. R. Civ. P. 23 which will provide direction to parties and the trial court regarding the disposition of residual funds in class action proceedings. Although class action matters may result in the creation of residual funds, Mass. R. Civ. P. 23 does not currently provide direction with respect to how such funds should be managed and disbursed. The proposed amendment fills this gap.

As you know, the IOLTA Committee collects interest on lawyers' trust accounts that would not otherwise generate interest for clients. It passes these revenues along to three charitable entities that make grants to assist the administration of justice and support legal aid to the poor.

In recent years, acting under the *cy pres* doctrine, courts both here in the Commonwealth and elsewhere throughout the country have awarded residual class action funds to programs that provide free legal services to low income persons. *Cy pres* means "as near as possible." This common law doctrine was developed in the trusts and estates context as a method of distributing funds from a charitable trust or probated estate when the original purpose for which the trust or testator's gift was established had become impossible, impracticable or illegal to perform. Under *cy pres*, the funds are distributed by the trustees or executor with the court's approval to a use that is as near as possible to the original purpose.

Applying the *cy pres* doctrine, courts have found legal aid programs and IOLTA programs to be appropriate recipients of residual class action funds for two basic reasons:

1. Legal services programs are often arguably the next best use of unclaimed funds because of their ability to indirectly benefit the members of a class for whom funds have been set aside and then not

distributed; and

2. The underlying mission of legal services programs for the poor is consistent with the purpose of class action lawsuits and Rule 23 of the Federal and State Rules of Civil Procedure. Rule 23 recognizes the need to protect the legal rights of those who, because of their economic position, would otherwise be unrepresented.

In numerous rulings, courts have held that the *cy pres* doctrine can be applied to residual funds from settlements or damage awards in class actions where (a) not all members of the class collect their portion of the settlement or award or (b) it is not possible to determine each plaintiff's actual damages or share of the settlement fund. The residual funds are put to their next best use for the aggregate, indirect, prospective benefit of the class members. Such *cy pres* awards are based on an analysis of the class' characteristics, with the court designating a third party that will use the funds in a way that indirectly benefits class members.

Newberg on Class Actions (Third Edition at section 10.25) notes that, "*Cy pres* and other fluid recovery distributions of unclaimed class funds have found growing acceptance among laws, procedural rules, and precedence of various states, as well as express authorization in federal statutes."

In determining the "next best use" of residual funds, courts have broad discretion. In *Van Gemert v. Boeing*, 739 F.2d 730 (2d Cir. 1984), the Court noted that "...trial courts are given broad discretionary powers in shaping equitable decrees. . . . (E)quitable remedies are a special blend of what is necessary, what is fair, and what is workable. . . . We believe that this principle should apply to equitable decrees involving the distribution of any unclaimed class action fund."

In Massachusetts, the *cy pres* doctrine has been used to distribute residual funds to legal services programs in several cases. In January 2006, the Superior Court approved a class action settlement agreement by which Staples Inc. resolved charges that it had violated the state's item pricing regulations by giving a \$7.50 voucher to as many as 76,800 Massachusetts shoppers. If the redeemed vouchers totaled less than \$252,000, the leftover balance in the class settlement fund was to be paid to the National Consumer Law Center. In another class action settlement the Bank of America promised to pay former BankBoston customers \$25 as part of a total settlement payment of \$12.5 million. If the number of people filing claims fell under a certain amount, there would be a distribution of residual funds to Greater Boston Legal Services, City Year and the National Consumer Law Center.

In California and Washington State, by statute and court rule, respectively, allocations of class action residual funds have been made to IOLTA programs. Illinois has recently passed legislation providing that residual class action funds be distributed to public interest and legal aid organizations.

Proposal

The IOLTA Committee proposes an amendment to Mass. R. Civ. P. 23 which will provide direction to parties and the trial court judges regarding disposition of residual funds in class action proceedings. The proposed amendment will direct payment of residual funds in any class action to the appropriate nonprofit organizations or foundations, or to the IOLTA Committee. In the event residual funds are dispersed to the IOLTA Committee, the Committee would distribute the funds to the three designated charitable entities pursuant to Mass. R. Prof. C. Rule 1.15 (4)(i).

In the Committee's judgment, the proposal codifies and refines the judicially developed *cy pres* doctrine in a way that is consistent with its equitable purpose and which will serve the compelling interest of ensuring equal access to justice.

The proposed amendment is designed to apply only in those cases in which the court approves or authorizes the creation of residual funds. It does not alter the ability of parties, subject to court approval, to formulate settlements that do not create residual funds remaining for distribution.

Prior to submitting this proposal for the Court's consideration, the IOLTA Committee submitted it for comment to the Access to Justice Commission, the Massachusetts Bar Association, the Boston Bar Association and the Project Directors of legal aid offices. The Access to Justice Commission unanimously approved the proposal at its February 14, 2008 meeting. The Massachusetts Bar Association House of Delegates approved the proposal at its January 14, 2008 meeting. The Project Directors approved the proposal during their January, 2008 meeting.

The Boston Bar Association Class Action Committee commented that the draft rule could be interpreted as limiting the discretion of the judge in deciding whether to create a residual fund. Since that was not intended by the IOLTA Committee, the language of the proposal was modified so that the full range of the judge's discretion would be preserved. As modified, the proposal was unanimously approved by the Council of the Boston Bar Association on March 18, 2008.

The text of the new Mass. R. Civ. P. 23 (e) as proposed by the Committee is as follows:

Disposition of Residual Funds. "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds.

Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class may provide for the disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, the residual funds shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based or to the Massachusetts IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts.

On behalf of the Committee, thank you for considering this important proposal. Should you or the SJC Rules Committee have any questions about this proposal, please do not hesitate to contact me or the Committee.

Sincerely,



Lisa C. Wood, Chair
IOLTA Committee

cc: Christine Burak, Esq.
Jayne Tyrrell, Esq.
Anthony Doniger, Esq.
David White, Esq.
Chief Justice Herbert Wilkins (Retired)